KHOOI BENG AUN

v.

KOH CHIN LEAN

HIGH COURT MALAYA, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CIVIL SUIT NO. 22-12-94 (T)]
29 JULY 1994

PRACTICE & PROCEDURE: Service of writ and statement of claim - Plaintiff served photostat copies of writ and statement of claim on defendant - Whether service bad in law - Subsequently defendant served with sealed copy of writ and statement of claim - Whether plaintiff needs leave of Court to re-activate matter in order to re-serve sealed copy of writ and statement of claim - Defendant applied for leave to enter conditional appearance with a view to set aside service of photostat copies of writ - Defendant already in possession of sealed copy of writ - Whether leave of Court to enter conditional appearance necessary - Order 62 r. 3 Rules of High Court 1980.

This was an application by the defendant for leave to enter a conditional appearance as he believed that the summons ought to be struck off and the writ set aside for two reasons. Firstly, that the plaintiff's claim was premature and bad in law as the condition precedent in the conflicting sets of agreements were not complied with. Secondly, the service of the writ of summons was bad in law as he had been served with the photostat copies of the writ and the statement of claim and, consequently, such service ought to be set aside.

Held:

[1] The service with photostat copies of the writ and the statement of claim on the defendant was clearly against O. 62 r. 3 of the Rules of the High Court 1980. Such non-compliance with that order cannot be treated as a mere irregularity which can be waived but rather as a matter which prevents any further proceedings from being taken.

[2] There was no need for the defendant to apply for leave to enter a conditional appearance at that juncture when the defendant had not been served with the sealed copies of the writ and the statement of claim. The purported service was bad and all proceedings thereafter were bad *ab initio*.

[3] There was also no need for leave to be obtained by the plaintiff to re-activate the matter when the plaintiff wanted to re-serve the sealed copies of the writ and the statement of claim on the defendant as there was no such requirement in the Rules of the High Court 1980.

[Defendant's application for leave to enter conditional appearance dismissed with no order as to costs].

Cases referred to:
Thompson v. Pheney 1 Down 443 ***(refd)***
Roase v. Kemphouse 103 L T 730; 27 T L R 132 ***(refd)***
Ratnam v. Cumarasamy [1965] 1 WLR 8 PC ***(refd)***
Syarikat Telekom Malaysia Bhd. v. Business Chinese Directory Sdn. Bhd. (Judgment Today No. 19/94); [1994] 2 CLJ 729

Legislation referred to:
Rules of the High Court 1980, O. 62 r. 3

For the plaintiff - Chong Kok Wei; M/s. Ngan & Tan
For the defendant - Sowaran Singh s/o Gurnam Singh; M/s. Ng Yook Woon, Andrew T.C. Saw & Co.

JUDGMENT

Haji Abdul Malik bin Haji Ishak JC:
This is an application by the defendant for leave to enter a conditional appearance (enclosure 11A) supported by an affidavit affirmed by the defendant dated 22 April 1994. In that affidavit,

the defendant deposed, *inter alia*, that on perusal of the statement of claim, he believed that the summons ought to be struck off and the writ set aside for two reasons. Firstly, that the plaintiff's claim was premature and bad in law as the condition precedent in the conflicting sets of agreements were not complied with. Secondly, the service of the writ of summons was bad in law as he had been served with the photostat copies of the writ and the statement of claim and, consequently, such service ought to be set aside.

The plaintiff's solicitor in rebuttal affirmed an affidavit (enclosure 13A) dated 13 July 1994, wherein it was deposed that upon realising the clerical error in serving the defendant with the photostat copies of the writ and the statement of claim, the matter was quickly rectified and the defendant was eventually served with the sealed copies of the writ and the statement of claim.

Before me both parties agreed to submit on one crucial issue, namely, the effect of the service of the photostat copies of the writ and the statement of claim on the defendant.

Mr. Sowaran Singh s/o Gurnam Singh submitted on behalf of the defendant that the bad service effected on the defendant by being served with the photostat copies of the writ and the statement of claim would nullify the whole claim and, in order to re-activate the case, the plaintiff must seek leave of this Court before serving the sealed copies of the writ and the statement of claim and it was for this reason that the defendant sought leave to enter a conditional appearance with a view to set aside the writ of summons in due course.

Mr. Chong Kok Wei argued on behalf of the plaintiff and submitted that there was no necessity to obtain leave to file the unconditional appearance and that the defendant can now proceed to file an appearance as the sealed copies of the writ and the statement of claim had been served on him. He further submitted that no leave was necessary to re-activate the case before the sealed copies of the writ and the statement of claim were served on the defendants.

Order 62, r. 3 of the Rules of High Court 1980 ("RHC") states that:

> Personal service of a document is effected by leaving a copy of the document with the person to be served and, if so requested by him at the time when it is left showing him:
>
> (a) in the case where the document is a writ or other originating process, the sealed copy; and
> (b) in any other case, an office copy.

Now, on persual of the affidavits filed in this Court, two things stood out clearly. Firstly, the photostat copies of the writ and the statement of claim were received by the defendant by post on 18 April 1994 and, secondly, the sealed copies of the writ and the statement of claim were received by the defendant on 29 April 1994, by A.R. Registered post. Thus, when the application in enclosure 11A came up for hearing on 28 July 1994, the sealed copies of the writ and the statement of claim were in the custody of the defendant. the defendant rightly did not object as to the manner of effecting personal service as envisaged under O. 62 r. 3 of the RHC, since the manner of receipt of the sealed copies of the writ and the statement of claim on 29 April 1994 by A.R. Registered post can be said to be good or sufficient service. I take it that by leaving a sealed copy of the document would mean handing it to that person, or at the very least, leaving it physically close to him so that an assumption of possession can arise and, at the same time, telling him of the purpose of the exercise. All the authorities require knowledge on the part of the recipients of the existence of the documents so served. Thus, in *Thompson v. Pheney* 1 Down 443 where the copy was thrown near the defendant and, in his presence, that copy was opened and the defendant refused to accept it, it was held to be sufficient service. And where the solicitor's clerk pushed the copy of the order in the inner fold of the defendant's coat which was unbuttoned and that copy fell as the defendant opened his coat, it was held that that was good service (*Roase v. Kemphouse* 103 LT 730; 27 TLR 132).

Reverting back to the issue at hand, when the defendant received the photostat copies of the writ and the statement of claim, the plaintiff had clearly gone against O. 62 r. 3 of the RHC. Such non-compliance with that order cannot be treated as a mere irregularity which can be waived but rather as a matter which prevents any further proceedings from being taken. I venture to

say further that the whole matter was bad *ab initio*. It seems to me that where the law provides a particular method or form of procedure for effecting the sealed copies of the writ and the statement of claim, then there must be strict compliance with those provisions, and the Court will not protect the plaintiff where the requirements have not been complied with. As was said by Lord Guest in *Ratnam v. Cumarasamy* [1965] 1 WLR SPC that the rules are meant to provide "a time-table for the conduct of litigation" and if I may add that that time-table must be strictly adhered to in order to avoid confusion (*Syarikat Telekom Malaysia Bhd. v. Business Chinese Directory Sdn. Bhd.* (Judgment Today No. 19/94). This means that when the defendant initially received the photostat copies of the writ and the statement of claim he should not be unduly alarmed. He should ignore it and if need be pretend to be ignorant. Even if the plaintiff, at that juncture, were to obtain judgment in default of appearance, the defendant could successfully set it aside as the purported service, of the photostat copies of the writ and the statement of claim, was bad and, consequently, all the proceedings thereafter were bad and whatever judgment obtained thereafter was accordingly a nullity. In short, at that juncture, the defendant had not been served with the sealed copies of the writ and the statement of claim and the purported service was bad and all proceedings thereafter were bad *ab initio*. In such a situation, there was no need for the defendant to apply for leave to enter a conditional appearance and, I agree entirely with Mr. Chong Kok Wei that neither was there a need for leave to be obtained by the plaintiff to re-activate the matter when the plaintiff wanted to re-serve the sealed copies of the writ and the statement of claim on the defendant as there is no such requirement in the RHC. For these reasons, the application in enclosure 11A was dismissed with no order as to costs.